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Regulating Virtual Child Pornography in the Wake of Ashcroft v. Free Speech Coalition

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REGULATING VIRTUAL CHILD PORNOGRAPHY IN THE WAKE OF *ASHCROFT V. FREE SPEECH COALITION*

INTRODUCTION

The United States Supreme Court, with its decision in *Ashcroft v. Free Speech Coalition*,[1] rejected cries from proponents of the regulation of virtual child pornography and held two provisions of the Child Pornography Prevention Act of 1996 ("CPPA")[2] unconstitutional.[3] Refusing to incorporate the CPPA's ban on virtual child pornography under either the *Miller v. California*[4] or *New York v. Ferber*[5] standards, the Court left open the status of virtual child pornography as constitutionally protected speech under the First Amendment.[6] In response to the Supreme Court's decision in *Free Speech Coalition*, Representative Mark Foley claimed that the Supreme Court "sided with pedophiles over children."[7] While Representative Foley's statement may grossly overstate the decision,[8] some serious questions remain as to the government's ability to regulate virtual child pornography in the wake of *Free Speech Coalition*.[9]

Rather than questioning the propriety of the Court's decision in *Free Speech Coalition*, this comment will focus on the future of virtual child pornography legislation in the aftermath of the Court's ruling. Part I will examine the legal framework the Supreme Court used to decide *Free Speech Coalition*. Part II will focus on the Court's decision in *Free Speech Coalition*, highlighting the problem with fitting virtual child pornography into the rubric of *Ferber*. Finally, Part III will critically examine Congress's response to the Court's decision and will propose possibilities for redrafting a statute to comply with the precedents set in both *Free Speech Coalition* and *Miller*.

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1. 535 U.S. 234 (2002).

2. Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2241, 2243, 2251, 2252, 2252A, 2256 (1996) & 42 U.S.C. § 2000aa (1996). For the purposes of this paper, citations will be to CPPA, 18 U.S.C.

3. *Free Speech Coalition*, 535 U.S. at 258 (The Court found two of the CPPA's provisions unconstitutional: 18 U.S.C. § 2256(8)(B)'s prohibition of material that "appears to be" of a minor engaging in sexually explicit conduct and 18 U.S.C. § 2256(8)(D)'s prohibition of sexually explicit material that "conveys the impression" that it is of a minor engaged in sex).

4. 413 U.S. 15 (1973).

5. 458 U.S. 747 (1982).

6. *See Free Speech Coalition*, 535 U.S. at 256.

7. *See* John Schwartz, *Swift, Passionate Reaction to a Pornography Ruling*, N.Y. TIMES, Apr. 17, 2002, at A18.

8. *See* Stephen V. Treglia, *Lawyers and Technology: After* Ashcroft *Is Virtual Child Porn A Crime?*, 228 N.Y. L.J. 5 (2002), *available at* WESTLAW ALLNEWS library (claiming that reading *Free Speech Coalition* to hold that virtual child pornography is now an area of protected speech is misguided).

9. *Id.*

I. BACKGROUND

The First Amendment demands that "Congress shall make no law . . . abridging the freedom of speech."[10] Unless speech falls into one of the categories accepted as being outside the First Amendment's veil of protection, that speech is presumed to be protected.[11] The government may constitutionally regulate speech that does not fit within the defined categories deserving of First Amendment protection.[12] To do so, the government must show a compelling government interest making the legislation necessary and demonstrate that the statute is narrowly tailored to achieving that interest.[13] Finally, even if a statute is narrowly tailored to accomplish a compelling government interest, the statute may still be unconstitutional if it is overbroad, thus proscribing a substantial amount of protected speech.[14]

Free Speech Coalition questions whether virtual child pornography fits into one of the categories outside of First Amendment protection, namely, child pornography.[15] The Court's analysis focused on whether Congress narrowly tailored the CPPA to accomplish the goal of protecting children.[16] Overbreadth was also addressed in the Court's interpretation of the CPPA in *Free Speech Coalition.*[17] The Court's decision in *Free Speech Coalition* demonstrates the judicial struggle and competing interests involved in reconciling regulation of pornography within the bounds of the First Amendment. In evaluating the CPPA's prohibition of virtual child pornography, the Court squarely faced the problem of fitting virtual child pornography into existing First Amendment law.[18]

This section will examine the Court's most notable attempt at defining obscenity law in *Miller v. California,*[19] as well as the Court's efforts to carve out a separate category of unprotected speech for child pornography in *New York v. Ferber.*[20] Following the discussion of the cases, this section will also outline the CPPA provisions at issue in *Free Speech*

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10. U.S. CONST. amend. I.

11. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245-46 (2002) ("The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.").

12. *Free Speech Coalition*, 535 U.S. at 245-46.

13. Content-based speech is judged under strict scrutiny. Some commentators have argued that the appropriate standard of review in *Free Speech Coalition* should be the balancing of interests test. This inquiry is beyond the scope of this Comment. For more information, see Wade T. Anderson, Comment, *Criminalizing "Virtual" Child Pornography Under the Child Pornography Prevention Act: Is It Really What It "Appears to Be?,"* 35 U. RICH. L. REV. 393, 418-20 (2001).

14. *See generally* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

15. *Free Speech Coalition*, 535 U.S. at 240.

16. *Id.* at 252-54.

17. *Id.* at 255-57.

18. *Id.* at 239-40.

19. 413 U.S. 15 (1973).

20. 458 U.S. 747 (1982).

Coalition. Finally, this section will briefly summarize the circuit courts' struggles in interpreting the CPPA and the disparate results that led to the Court's decision to grant certiorari.

A. Miller v. California[21]

In *Roth v. United States*,[22] the Supreme Court held that obscenity, as a category of speech, falls outside the boundaries of First Amendment protection.[23] Between *Roth*, in 1957, and the Court's decision in *Miller v. California*, in 1973, the Court struggled to define obscenity and develop a workable standard for identifying obscene speech.[24] In fact, before the *Miller* decision, even members of the Court expressed difficulty defining obscenity. In his concurring opinion in *Jacobellis v. Ohio*,[25] Justice Stewart wrote, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . ."[26] The struggle over the definition of obscenity continued for nearly a decade without any clear standard for identifying unprotected obscenity.

Miller v. California marked the culmination of the Supreme Court's attempts to determine the boundary between speech worthy of First Amendment protection and unprotected obscenity.[27] *Miller* delineates the current standard of acceptable regulation of what Justice Harlan called "the intractable obscenity problem."[28] In that case, the State of California charged the defendant, Miller, with a misdemeanor for knowingly distributing obscene materials in violation of California law.[29] Miller was

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21. 413 U.S. 15 (1973).

22. 354 U.S. 476 (1957).

23. *Roth*, 354 U.S. at 484-85 (The Court found that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." Thus, the Court concluded that "obscenity is not within the area of constitutionally protected speech or press.").

24. *See* Mishkin v. New York, 383 U.S. 502 (1966); Ginzburg v. United States, 383 U.S. 463 (1966); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966).

25. 378 U.S. 184 (1964).

26. *Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring).

27. *Miller*, 413 U.S. at 16.

28. *Id.* at 16 (citing Interstate Circuit Inc. v. Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., concurring and dissenting)).

29. *Id.* at 16-18. The defendant was charged under a California statute that provided in relevant part:

> § 311.2. Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state:
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> (a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

charged after he allegedly sent an unsolicited brochure containing explicit pictures and drawings of men and women engaging in sexual activities to a restaurant owner and his mother.[30] Finding that the State had a legitimate interest in prohibiting distribution of obscene material, the Court concluded that a state may constitutionally regulate obscenity without violating the First Amendment.[31]

The Court limited the scope and definition of obscenity to apply only to material depicting or describing sexual conduct.[32] The Court also found that for a regulation to be constitutional it must be "specifically defined" in the statute.[33] Finally, if the material challenged fits within these guidelines, then the reviewing court would examine under the following test, which required that "[a] state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."[34] This test for obscenity, outlined in *Miller*, remains the constitutional standard required of all obscenity statutes. However, almost a decade later, the Court determined that obscenity laws were insufficient to regulate some types of indecent material, namely child pornography.[35]

B. New York v. Ferber[36]

Paul Ferber was criminally charged under a New York obscenity statute after he sold pornographic films showing young boys masturbating to an undercover police officer.[37] The statute prohibited the knowing promotion of sexual performances by minors by distribution of material depicting such performances.[38] The New York Court of Appeals found

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> § 311. Definitions
> As used in this chapter:
> (a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

Id. (citing CAL. PENAL CODE § 311 (1968)).

30. *Miller*, 413 U.S. at 18.
31. *Id.* at 18-20.
32. *Id.* at 24.
33. *Id.*
34. *Id.*
35. *See Ferber*, 458 U.S. at 765.
36. 458 U.S. 747.
37. *Id.* at 751-52.
38. *Id.* at 751. At issue in *Ferber* was New York Penal Law § 263.15. In relevant part, the statute read: "A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes

the statute unconstitutional because it failed to delineate the *Miller* requirements for obscenity.[39] However, in 1982, the Supreme Court reversed, deciding that the First Amendment did not protect child pornography, and that a state could regulate the distribution of child pornography wholly apart from the *Miller* obscenity standard.[40]

Upholding New York's regulation of child pornography, the Court focused primarily on the harm to children created by the production of child pornography.[41] The Court adopted five justifications for allowing states greater latitude in regulating child pornography.[42] First, the Court found that the production of child pornography was intrinsically related to the sexual abuse of children.[43] Second, the Court determined that sexually explicit material using children created a permanent record of the abuse, which would harm the participants each time it was distributed.[44] In addition, the Court concluded that the State's interest in protecting children from sexual exploitation in the creation of child pornography could only be controlled by prohibiting the distribution of pornographic materials produced using children.[45] Third, the Court recognized that the sale and distribution of child pornography sustained the market for these kinds of materials and continued the exploitation of children in production of pornography.[46] Fourth, the Court defended the statute's proscription of speech on the ground that child pornography was of only *de minimis* value.[47] Importantly, the Court noted that the First Amendment protects the use of adult simulation if the depiction of children engaging in sexually explicit conduct is necessary to add literary, artistic, political, or scientific value to a work.[48] And fifth, the Court found that the earlier precedent did not preclude the exclusion of child pornography as an unprotected category of speech.[49]

The Court concluded that states could constitutionally regulate child pornography without regard to the *Miller* obscenity requirements because of the harm to children intrinsic in the production of child pornography.[50] Justice White wrote, "The *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular

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sexual conduct by a child less than sixteen years of age." "'Promote' means to procure, manufacture, issue, sell." *Id.* (citing N.Y. PENAL LAW § 263 (1977)).

39. New York v. Ferber, 422 N.E. 2d 523, 525-26 (N.Y. 1981).
40. *Ferber*, 458 U.S. at 764-65.
41. *Id.* at 759-60.
42. *Id.* at 756-64.
43. *Id.* at 756.
44. *Id.* at 759.
45. *Id.*
46. *Id.* at 761-62.
47. *Id.* at 762.
48. *Id.* at 762-63.
49. *Id.* at 763.
50. *Id.* at 756.

and more compelling interest in prosecuting those who promote the sexual exploitation of children."[51] Thus, the Court upheld the New York statute as constitutional, and in doing so, created a new category of speech beyond the bounds of First Amendment protection.[52] Federal laws passed in the wake of *Ferber*'s ban on child pornography were largely useful in combating child pornography. However, with the dawn of the Internet and technological advances that led to the increasing availability of child pornography in cyberspace, existing federal laws have become increasingly impotent in dealing with the new technology.[53]

C. The Child Pornography Prevention Act of 1996

Before the enactment of the CPPA in 1996, Congress attempted to regulate child pornography under a variety of statutes.[54] However, with advances in computer technology, the existing law left loopholes for computer-generated images of children engaging in sexual acts, now commonly known as virtual child pornography.[55] Congress addressed the growth of virtual child pornography in 1996 by enacting the CPPA, including thirteen legislative findings regarding the ills of virtual pornography, in an attempt to fill the void left by existing laws.[56]

To combat virtual child pornography, Congress amended the definition of "child pornography" to include computer-generated images of minors engaging in sexually explicit conduct.[57] With regard to virtual images specifically, the CPPA defined child pornography *inter alia* as:

> any visual depiction, including any . . . computer-generated image . . . where--
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> . . . .
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> (B) such visual depiction is, or *appears to be*, of a minor engaging in sexually explicit conduct . . . ;
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> . . . .
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> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that *conveys the*

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51. *Id.* at 761.

52. *Id.* at 773-74.

53. *See* Anderson, *supra* note 13, at 402.

54. *See id.* at 396-98 (discussing legislative attempts at regulating child pornography since the 1970s).

55. *Id.* at 402 (Existing laws covered only pornography produced using real children, thus leaving a loophole for virtual child pornography. Furthermore, prosecutors had a difficult task in convicting pornographers because the defendant could always provide reasonable doubt by suggesting the material was produced using only virtual children.).

56. *Id.* at 403.

57. CPPA, 18 U.S.C § 2256(8) (1996).

> *impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.[58]

The "appears to be" clause and the "conveys the impression" clause are the provisions that were specifically at issue in *Free Speech Coalition*.[59]

D. Circuit Courts' Interpretation of the CPPA

Since the CPPA's enactment in 1996, five cases, including *Free Speech Coalition*, have made their way to federal appellate courts.[60] The First, Fourth, Fifth, and Eleventh Circuits upheld the constitutionality of the CPPA.[61] Conversely, the Ninth Circuit, in *Free Speech Coalition v. Reno*,[62] found that the CPPA failed to serve a compelling government interest and was unconstitutionally vague and overbroad.[63]

Each of the four circuits that upheld the CPPA's constitutionality did so, in part, by extending the rationale of *Ferber* and its progeny.[64] These courts concluded that the secondary harm associated with virtual child pornography was sufficient justification for limiting virtual images.[65] However, the Ninth Circuit refused to accept that there was a "nexus"[66] between virtual child pornography and harm to children. Thus, the Ninth Circuit declined to enlarge *Ferber* to include a constitutional prohibition on virtual child pornography.[67]

As written, the CPPA does not fit neatly within the *Miller* obscenity standard. Nor does the CPPA's ban on *virtual* child pornography follow directly from the holding and rationale in *Ferber*. With the lower courts diametrically opposed on the constitutionality of the CPPA, the time was ripe for a final decision on congressional ventures into regulating virtual

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58. *Id.* (emphasis added).

59. *Free Speech Coalition*, 535 U.S. at 241-42. Section 2256(8)(C) was not challenged by the Coalition, but the majority opinion notes that it will likely fall under the *Ferber* standard since there is harm to actual children in the distribution of morphed images. *See* Anderson, *supra* note 13, at 404 (Section 2252 was also amended to incorporate the definitions of § 2256 in criminalizing the "use of a minor engaging in sexually explicit conduct.").

60. *See* United States v. Fox, 248 F.3d 394 (5th Cir. 2001); United States v. Mento, 231 F.3d 912 (4th Cir. 2000); Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999); United States v. Hilton, 167 F.3d 61 (1st Cir. 1999).

61. *See Fox*, 248 F.3d 394; *Mento*, 231 F.3d 912; *Acheson*, 195 F.3d 645; *Hilton*, 167 F.3d 61.

62. 198 F.3d 1083.

63. *Id.* at 1096.

64. *See Fox*, 248 F.3d at 401; *Mento*, 231 F.3d at 919-20; *Acheson*, 195 F.3d at 650; *Hilton*, 167 F.3d at 69-71. The circuits were split not only as to the statute's constitutionality, but also as to an appropriate standard of review. This inquiry is beyond the scope of this Comment and will not be addressed.

65. *Fox*, 248 F.3d 394; *Mento*, 231 F.3d at 912; *Acheson*, 195 F.3d at 645; *Hilton*, 167 F.3d at 61.

66. *See Free Speech Coalition*, 198 F.3d at 1094.

67. *Id.* at 1092.

child pornography. Thus, the Court granted certiorari to *Free Speech Coalition* to quiet the debate.[68]

II. *ASHCROFT V. FREE SPEECH COALITION*[69]

A. Facts

The Free Speech Coalition ("the Coalition"), a California trade organization consisting of businesses in the adult entertainment industry, artists, and authors, brought this facial challenge to the CPPA.[70] Though none of the groups or individuals who challenged the statute had been charged, the Coalition feared their "adult-oriented" work might fall under the prohibitions on virtual child pornography as defined by the CPPA.[71] Thus, the Coalition brought suit seeking declaratory and injunctive relief on the ground that the CPPA was vague and overbroad.[72]

The respondents brought the case, originally captioned as *Free Speech Coalition v. Reno*,[73] in federal court in California. The district court granted summary judgment in favor of the government.[74] In 1999, the Ninth Circuit reversed the decision of the district court, holding that the CPPA was an unconstitutional ban on free speech protected under the First Amendment.[75] The Supreme Court granted certiorari in 2001.[76]

B. The Majority Opinion

With the split among the circuit courts, *Free Speech Coalition* presented the Court with an opportunity to settle the question over the proper placement of virtual child pornography within the rubric established by *Miller*, *Ferber*, and their progeny.[77] Faced with this challenge, the Court refused to equate the CPPA's ban on virtual child pornography with the constitutionally permissible prohibition on real child pornography under *Ferber* or obscenity under *Miller*.[78] Moreover, the majority rejected the government's assertion of any compelling interest justifying

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68. Ashcroft v. Free Speech Coalition, 531 U.S. 844 (2001).
69. 535 U.S. 234 (2002).
70. *Free Speech Coalition*, 535 U.S. at 234.
71. *Id.*
72. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1086 (9th Cir. 1999).
73. No. C 97-0281VSC, 1997 WL 487758, at *1 (N.D. Cal. Aug. 12, 1997).
74. *Free Speech Coalition*, 1997 WL 487758, at *7.
75. Free Speech Coalition v. Reno, 198 F.3d 1083, 1086 (9th Cir. 1999).
76. Ashcroft v. Free Speech Coalition, 531 U.S. 844 (2001).
77. *See* Osborne v. Ohio, 495 U.S. 103 (1990) (upholding an Ohio statute criminalizing possession of child pornography by extending *Ferber* to include limiting the market for child pornography and protecting victims from ongoing showing of pornography); New York v. Ferber, 458 U.S. 747 (1982); Miller v. California, 413 U.S. 15 (1973).
78. *Free Speech Coalition*, 535 U.S. at 240.

regulation of virtual child pornography under the CPPA.[79] Finally, the Court ruled that the CPPA, as written, was overbroad and thus unconstitutional, as a substantial amount of protected speech could be chilled under the statute.[80]

First, the Court found that the CPPA could not be interpreted as a supplement to the constitutional proscription of obscenity under *Miller*.[81] The Court found that the CPPA failed to include any connection between the prohibited work and community standards of offensiveness.[82] In addition, the Court determined that the CPPA did not act as a supplement to existing obscenity standards because it failed to account for the work's literary, scientific, artistic, or political value.[83]

Second, the Court refused to extend *Ferber*'s ban on pornography produced using real children to include the CPPA's prohibition on all virtual child pornography.[84] As discussed above, constitutionally permissible regulation of real child pornography under the *Ferber* line of cases was originally justified because of the primary harm to children affected during the production of child pornography.[85] In the words of Justice Kennedy, "The production of the work, not its content, was the target of the statute."[86]

Interpreting the *Ferber* holding and rationale narrowly, the Court concluded that the CPPA's ban on virtual child pornography was not simply an augmentation of *Ferber* necessitated by technological advances. Rather, the Court determined that, unlike *Ferber*, "the harm" from virtual child pornography "does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts."[87] This reasoning suggests that the Court will likely be unwilling to accept the constitutionality of any legislative attempt to limit virtual child pornography under *Ferber* and its progeny.

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79. *Id.* at 251-55.

80. *Id.* at 256.

81. *Id.* at 251 (citing *Miller*, 413 U.S. at 24) (Under the *Miller* obscenity test, the government must show that, taken as a whole, the work in question: 1) appeals to the prurient interest; 2) is patently offensive in light of community standards; and 3) lacks any serious literary, artistic, political, or scientific value.).

82. *Id.* at 246.

83. *Id.*

84. *Id.* at 251.

85. The *Ferber* Court grounded its ruling to permit regulation of child pornography beyond the confines of *Miller* because of the intrinsic harm to children in the production of child pornography. *Ferber*, 458 U.S. at 759. Conversely, in virtual child pornography, the impact on children is secondary, i.e., child pornography whets the appetites of pedophiles or may be used by a pedophile as an aid to lure children. *Free Speech Coalition*, 535 U.S. at 242.

86. *Free Speech Coalition*, 535 U.S. at 249.

87. *Id.* at 250.

After concluding that the CPPA did not fit within any of the constitutional categories of *per se* unprotected speech, the Court rejected the government's assertions that the CPPA was narrowly tailored to serve a compelling interest.[88] The government presented four arguments aimed at convincing the Court that the CPPA should be upheld. Though the reasoning is somewhat intertwined, the Court rejected each of these claims, finding that two of the assertions failed strict scrutiny and two suffered from overbreadth by prohibiting a substantial amount of protected speech.[89]

The government argued that the CPPA was necessary to prevent pedophiles from using virtual child pornography to seduce children.[90] The Court found this argument unpersuasive for two reasons. First, the Court concluded that a pedophile might use many things, including video games and candy, to seduce children.[91] Second, the Court found that other laws, such as those that prohibit unlawful solicitation of a minor, more closely regulate the unsavory use of virtual pornography.[92] Thus, according to the majority, the CPPA was not narrowly tailored because the protection of children from pedophiles might be accomplished through less restrictive means.[93]

In addition to being needlessly restrictive, the Court also found that the CPPA failed to serve the government's compelling interest of protecting children from pedophiles.[94] Justice Kennedy wrote, "The evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question."[95] The Court similarly rejected the government's argument that virtual child pornography "whets the appetites of pedophiles."[96] Again citing the apparent disconnect between pornography and conduct, the Court concluded that a tendency to cause illegal conduct was an insufficient justification for limiting speech.[97] The majority's rejection of the government's asserted interests in protecting children from pedophiles highlights the Court's wariness to accept the causal connection between virtual child pornography and harm to children.[98]

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88. *See id.* at 252.
89. *Id.* at 256.
90. *Id.* at 251.
91. *Id.*
92. *Id.* at 251-52.
93. *Id.* at 252.
94. *Id.* at 253.
95. *Id.* at 252.
96. *Id.* at 253.
97. *Id.* at 253-54.
98. *Id.* at 244-46.

In addition to repudiating arguments based on the assumption that virtual child pornography enhances the likelihood of pedophilia, the Court also rejected the government's assertions that the CPPA was needed to enforce existing laws regulating child pornography.[99] The government made two arguments, both rejected, aimed at convincing the Court of the CPPA's necessity to ensure enforcement of *Ferber*'s ban on child pornography.[100] Both arguments centered on the premise that virtual child pornography is indistinguishable from pornography using real children.[101]

First, the government claimed that because virtual child pornography and actual child pornography are part of the same market, the Court should extend the *Ferber* and *Osborne* rationales to include virtual child pornography.[102] This would allow the government to better enforce the existing ban on real child pornography by eliminating the market.[103] The Court found this argument unpersuasive, reasoning that if the two were truly indistinguishable, there would be no market for real child pornography, as potential offenders could avoid prosecution by simply using virtual images.[104]

Additionally, the government argued that technological advances have made real and virtual pornography indistinguishable, in turn making prosecution of real child pornographers impossible.[105] In answer to both of the enforcement arguments, the Court found that "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech."[106] Citing *Broadrick v. Oklahoma*,[107] the Court concluded that the CPPA was overbroad because it regulated a substantial amount of constitutionally permissible speech.[108]

Though the government asserted the statute's inclusion of an affirmative defense as a remedy to the overbreadth problem, the Court found that the affirmative defense proved incomplete.[109] The defense allowed a defendant to escape prosecution if he could prove that the materials were produced using adults and that they were not distributed in a way that conveyed the impression that the material showed real children.[110] The Court found, however, that since the statute only permitted

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99. *Id.* at 254.
100. *See id.* at 249-54.
101. *Id.* at 249, 254.
102. *Id.* at 254.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 255.
107. 413 U.S. 601 (1973).
108. *See Free Speech Coalition*, 535 U.S. at 255-56 (citing *Broadrick*, 413 U.S. at 612).
109. *Id.* at 256.
110. *Id.* at 255.

such a defense for distributors, but not possessors, a significant amount of protected speech would be restricted in the CPPA's attempt to distinguish real from virtual child pornography.[111]

In addition to the "appears to be" clause of the CPPA, the Coalition also challenged the "conveys the impression" clause.[112] Like the "appears to be" language of the CPPA, the Court also found that the "conveys the impression" portion served no compelling government interest.[113] The majority found the government's evidence insufficient to show any harm in material merely pandered as containing child pornography.[114] Furthermore, the majority found that the "conveys the impression" language was overbroad because the statute prohibited the mere possession of materials that were pandered as child pornography.[115] In sum, the Court concluded that the challenged portions of the CPPA were overbroad and unconstitutional.[116] As such, the Court did not address the Coalition's vagueness challenge.[117]

C. Justice Thomas's Concurrence

Though Justice Thomas concurred with the majority, finding the CPPA unconstitutional, he wrote separately to assert his view that the prosecution rationale might serve a compelling government interest in the future.[118] Justice Thomas noted that the government failed to produce evidence that prosecution of real child pornographers was made impossible with the existence of virtual child pornography.[119] However, he argued that if technological advances caused such a result, the government's interest in prosecuting offenders might justify increased regulation of virtual child pornography.[120]

D. Chief Justice Rehnquist's Dissent

Chief Justice Rehnquist, joined by Justice Scalia, dissented from the majority's holding that the CPPA was unconstitutional.[121] First, Chief

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111. *See id.* at 256.

112. *Id.* This clause prohibits depictions of sexually explicit conduct that are "advertised, promoted, presented, described, or distributed in such a manner that convey the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." CPPA, 18 U.S.C. § 2256(8)(D) (1996).

113. *See Free Speech Coalition*, 535 U.S. at 256-57.

114. *Id.* at 257.

115. *Id.* at 257-58.

116. *Id.* at 258.

117. *Id.*

118. *See id.* at 259 (Thomas, J., concurring).

119. *Id.* (Thomas, J., concurring).

120. *Id.* at 259-60 (Thomas, J., concurring).

121. *See id.* at 267 (Rehnquist, C.J., dissenting) (Justice Scalia joined in the dissent except as to the paragraph outlining the legislative history, at pp. 271-72 n.2).

Justice Rehnquist deferred to the legislative findings, contending that the government had demonstrated a compelling interest in securing the ability to enforce child pornography regulations.[122] Second, Chief Justice Rehnquist objected to the majority's judgment that the CPPA was overbroad.[123] Instead, Chief Justice Rehnquist argued, the Court should interpret the definitions of the CPPA narrowly to apply only to "the sort of 'hard core of child pornography' that we found without protection in *Ferber*."[124]

In arguing to limit the CPPA's scope, the Chief Justice contended that the statute's definition of "sexually explicit conduct" should be limited to images that are "virtually indistinguishable" from pornography using real children.[125] In addition, Chief Justice Rehnquist argued to limit the CPPA's prohibition against possession or distribution of work that "conveys the impression" that it contains minors engaging in sexually explicit conduct to materials pandered as child pornography.[126] Furthermore, the Chief Justice concluded that the CPPA's "conveys the impression" language should be interpreted as limited to the "knowing" possession of materials containing depictions of real minors engaged in sexually explicit conduct or depictions that are virtually indistinguishable from real children.[127] According to the Chief Justice, this narrow interpretation of the "conveys the impression" clause would ensure that the CPPA could only apply to those who pander child pornography or knowingly possess images of real child pornography.[128] Moreover, the narrow interpretation of the CPPA in general would limit its application to only "hard core" pornography.[129]

E. Justice O'Connor's Concurrence in Part/Dissent in Part

Justice O'Connor concurred with the majority's finding that the "conveys the impression" provision of the CPPA was unconstitutional.[130] However, she opined that the "appears to be" clause should be held con-

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122. *Id.* at 270-71 (Rehnquist, C.J., dissenting).

123. *See id.* at 268 (Rehnquist, C.J., dissenting) (arguing that a finding of overbreadth should only be reserved for extreme cases where the statute in question cannot be remedied by a limiting instruction (citing *Broadrick*, 413 U.S. at 613)).

124. *Id.* at 269 (Rehnquist, C.J., dissenting).

125. *Id.* (Rehnquist, C.J., dissenting).

126. *Id.* at 271-72 (Rehnquist, C.J., dissenting).

127. *Id.* at 273 (Rehnquist, C.J., dissenting) (Chief Justice Rehnquist argued that this limitation would not limit possession of materials that contain only suggestive depictions of youthful looking actors.).

128. *See id.* at 271 (Rehnquist, C.J., dissenting).

129. *Id.* at 269-70 (Rehnquist, C.J., dissenting).

130. *Id.* at 261 (O'Connor, J., concurring in part and dissenting in part).

stitutional as applied to virtual child pornography.[131] Justice O'Connor argued that the government has a compelling interest in protecting children by regulating both actual and virtual child pornography.[132] Like Chief Justice Rehnquist, Justice O'Connor also deferred to the legislative findings that virtual child pornography whets the appetites of pedophiles and makes prosecution of child pornographers impossible.[133]

Additionally, Justice O'Connor found the CPPA to be narrowly tailored.[134] Rather than finding the CPPA unconstitutionally broad in its sweep, Justice O'Connor argued that the statute should be interpreted to apply only to those virtual images that are "virtually indistinguishable" from pornography produced using real children.[135] Reading the CPPA's "appears to be" clause closely, Justice O'Connor concluded that the statute was narrowly tailored to serve a compelling government interest and was not overbroad.[136] Thus, Justice O'Connor concurred with the majority's finding that the "conveys the impression" clause was overbroad, but concluded that the "appears to be" provision was constitutional as applied to images that are virtually indistinguishable from real child pornography.[137]

III. ANALYSIS

Taking the CPPA as a whole, the Court refused to find a sufficient connection between the possession or distribution of virtual child pornography and the crime of child abuse.[138] Given the *Free Speech Coalition* opinion, the issue of whether virtual child pornography can ever be prohibited under the same justification and with the same force as *Ferber* is questionable at best. Though the Court may not have eliminated the possibility that an affirmative defense might save the statute,[139] it seems unlikely, given the current makeup of the Court, that five justices will ever find a statute like the CPPA constitutional.[140] Thus, if the legislative findings on the ills of virtual child pornography are correct, the challenge, at least for the government, then becomes finding a constitutional means to regulate virtual child pornography.

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131. *See id.* (O'Connor, J., concurring in part and dissenting in part) (arguing that the prohibition on youthful adult pornography is unconstitutional and suggests that the provision be stricken rather than finding the CPPA as a whole overbroad).

132. *Id.* at 263 (O'Connor, J., concurring in part and dissenting in part).

133. *Id.* at 263-64 (O'Connor, J., concurring in part and dissenting in part).

134. *See id.* at 264-65 (O'Connor, J., concurring in part and dissenting in part).

135. *Id.* at 265 (O'Connor, J., concurring in part and dissenting in part).

136. *Id.* at 264-65 (O'Connor, J., concurring in part and dissenting in part).

137. *See id.* at 267 (O'Connor, J., concurring in part and dissenting in part).

138. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 250-51 (2002).

139. *Free Speech Coalition*, 535 U.S. at 255-56.

140. *But see id.* at 259-60 (Thomas, J., concurring) (implying that the prosecution problem, if proven, might be a compelling enough interest).

Within weeks of the Supreme Court's controversial decision in *Free Speech Coalition*, Congress responded with its first attempt to address the Court's ruling and began work on the Child Obscenity and Pornography Prevention Act of 2002 ("COPPA").[141] In keeping with Congress's swift action following the *Free Speech Coalition* decision, COPPA worked its way through the legislative process and the House passed the bill on June 25, 2002 by a vote of 413-8.[142] However, neither the Senate companion bill, S. 2511,[143] nor the House-passed measure[144] were taken-up by the Senate before it adjourned *sine die* on November 20, 2002 for the 2nd Session of the 107th Congress.[145] Given the rapidity of congressional action in the wake of *Free Speech Coalition*, as well as the overwhelming bipartisan support for COPPA, it is clear that the Court's ruling touched a nerve, at least in the 107th Congress.

This comment will evaluate COPPA as a proposal for constitutional regulation of virtual child pornography. After examining the constitutional obstacles inherent in COPPA following *Free Speech Coalition*, I will address the potential political obstacles to regulating virtual child pornography constitutionally, and Congress's historical unwillingness to consider the constitutionality of pending legislation. Finally, I will propose what I believe to be a constitutional solution for regulating virtual child pornography under a *Miller* statute, demonstrating that enforcement

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141. Representative Lamar Smith (R-Tex), Chair of the House Subcommittee on Crime, Terrorism, and Homeland Security, introduced the Child Obscenity and Pornography Prevention Act of 2002 ("COPPA"), H.R. 4623, 107th Cong. (2002) [hereinafter COPPA], on April 30, 2002, two weeks after the Court announced its ruling in *Free Speech Coalition*. Rep. Smith was elected to the House of Representatives in 1986. He is a graduate of Yale University and Southern Methodist University College of Law.

142. 148 CONG. REC. H3913 (daily ed. June 25, 2002).

143. Child Obscenity and Pornography Prevention Act of 2002, S. 2511, 107th Cong. (2002); *see* Thomas Legislative Service, *Bill Summary & Status for the 107th Congress*, *at* http://thomas.loc.gov/cgi-bin/bdquery/z?d107:SN02511:@@@L&summ2=m& (last visited Jan. 1, 2003). The Senate companion bill was introduced by Senator Jean Carnahan (D-Mo) on May 14, 2002. *See* Thomas Legislative Service, *Bill Summary & Status for the 107th Congress*, *at* http://thomas.loc.gov/cgi-bin/bdquery/z?d107- :SN02511: (last visited Jan. 1, 2003).

144. *See* Thomas Legislative Service, *Bill Summary & Status for the 107th Congress*, *at* http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR04623:@@@L&summ2=m& (last visited Jan. 1, 2003).

145. 148 CONG. REC. S11,801 (daily ed. Nov. 20, 2002). However, the Senate Judiciary Committee held a hearing on child pornography on October 2, 2002, addressing legislation confronting this problem. *See Stopping Child Pornography: Protecting Our Children and the Constitution: Hearing on S.R. 2520 Before the Senate Comm. on the Judiciary*, 107th Cong. (2002) [hereinafter *Senate Hearing*]. In addition, the Senate introduced its own child pornography legislation, the Prosecutorial Remedies and Tools Agtainst Exploitation of Children Today Act of 2002 ("PROTECT"), S. 2520, 107th Cong. (2002) [hereinafter PROTECT], sponsored by Senators Patrick Leahy (D-Vt) and Orrin Hatch (R-Utah), which passed the Senate on November 14, 2002. *See* 148 CONG. REC. S11,153 (daily ed. Nov. 14, 2002). No House action, however, was taken on the PROTECT Act. *See* Thomas Legislative Service, *Bill Summary & Status for the 107th Congress*, *at* http://thomas.loc.gov/cgibin/- bdquery/D?d107:1:./temp/~bd3pMf:@@@X|/bss/d107query.html (last visited Jan. 1, 2003).

of existing obscenity regulation will likely catch and punish at least the worst cases of even virtual child pornography.

A. *The Child Obscenity and Pornography Prevention Act of 2002*

At a May 9, 2002 hearing before the House Subcommittee on Crime, Terrorism, and Homeland Security,[146] Associate Deputy Attorney General Daniel Collins outlined the task of revising the CPPA within the confines of *Free Speech Coalition*.[147] He said, "[W]e believe that the Court's decision and the Constitution leave the Congress with ample authority to enact a new, more narrowly focused statute that will allow the government to accomplish its legitimate and compelling objectives without interfering with First Amendment freedoms."[148] In essence, the goal of this new legislation was to formulate a congressional response to the Court's decision in *Free Speech Coalition*. COPPA marked a continuation of Congress's attempt to bring virtual child pornography within the rubric of *Ferber*'s prohibition of pornography produced using real children.[149]

In COPPA, the House honed in on some of the questions left unanswered after *Free Speech Coalition*. Following the lead of Justice Thomas's concurrence,[150] Congress revised the stated purpose of the CPPA with greater particularity. Moreover, COPPA also sought to capitalize on the loopholes left after *Free Speech Coalition* by narrowing definitions and supplementing its affirmative defense.[151] Ostensibly, this legislation complied with the rules established for regulating virtual child pornography by *Free Speech Coalition*.

COPPA purportedly sought to refine and narrow the scope of the unconstitutional "appears to be" language of the CPPA in three ways.[152] Specifically, COPPA: 1) localized its stated purpose to enforcement of

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146. *Child Obscenity and Pornography Prevention Act of 2002 and the Sex Tourism Prohibition Improvement Act of 2002: Hearing on H.R. 4623 and H.R. 4477 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the Comm. on the Judiciary*, 107th Cong. (2002) (statement of Associate Deputy Attorney General Daniel P. Collins, on behalf of the Dept. of Justice) [hereinafter *House Hearing*].

147. *Id.* at 3-9 (statement of Associate Deputy Attorney General Daniel P. Collins, on behalf of the Dept. of Justice).

148. *Id.* at 6.

149. *See* COPPA, H.R. 4623, § 2 (2002); *see also Free Speech Coalition*, 535 U.S. at 249-56 (The Government argued specifically that the virtual child pornography prohibited by the CPPA should be treated the same as child pornography and thus is subject to regulation without regard to value under *Ferber* and its progeny.).

150. *See Free Speech Coalition*, 535 U.S. at 259 (Thomas, J., concurring) ("[T]echnology may evolve to the point where it becomes impossible to enforce actual child pornography laws . . . [and] in the event this occurs, the Government should not be foreclosed from enacting a regulation of virtual child pornography.").

151. *See* COPPA, H.R. 4623, § 3.

152. *See* COPPA, H.R. 4623, preamble; *House Hearing*, *supra* note 146, at 4-5.

existing child pornography law, 2) redefined the scope of what constitutes virtual child pornography, and 3) exploited the possibility that an affirmative defense might save an otherwise overbroad statute.[153] In addition, COPPA attempted to address the Court's criticisms of the "conveys the impression" language of the CPPA by devising a pandering provision that would pass constitutional muster.[154] Thus, the recurring question of whether the government can constitutionally proscribe virtual child pornography is focused on whether COPPA narrows the arena of affected speech sufficiently to permit constitutional regulation.

First, COPPA concentrated its focus by limiting its stated purpose, or government interest, to the enforcement of existing laws prohibiting actual child pornography.[155] Congress found that enforcing existing law is becoming increasing difficult because of the existence of virtual child pornography.[156] As discussed at length in Part II, the government in *Free Speech Coalition* advanced a number of theories for equating the CPPA's ban on virtual child pornography with *Ferber*. With the majority unwilling to accept these arguments, the government alternatively argued, *inter alia*, that advances in technology were making it increasingly difficult to prosecute purveyors of real child pornography due to the automatic defense that the material was virtual, and thus not produced using actual children.[157] Though not ultimately accepted by the majority, Justice Thomas's concurrence highlights the possibility that this "prosecution problem" may someday justify the prohibition of virtual child pornography.[158] Moreover, the dissenting justices in *Free Speech Coalition* also describe this narrow focus of the CPPA as a compelling government interest sufficient to permit proscription of virtual child pornography. [159]

COPPA outlined its stated focus in the Congressional Findings that accompany the new amendments.[160] In his hearing testimony, Associate Deputy Attorney General Collins claimed:

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153. *See* COPPA, H.R. 4623, § 2; *House Hearing*, *supra* note 146, at 4-5.

154. *See* COPPA, H.R. 4623, § 3; *House Hearing*, *supra* note 146, at 5. COPPA's amended pandering provisions will be outlined below. However, the attention of this Comment will be directed at analysis of COPPA's amendments to the definition of child pornography and the scope of COPPA.

155. *See* COPPA, H.R. 4623, § 2; *House Hearing*, *supra* note 146, at 4.

156. *See* COPPA, H.R. 4623, § 2.

157. *Free Speech Coalition*, 535 U.S. at 254.

158. *Id.* at 259 (Thomas, J., concurring).

159. *Id.* at 267 (Rehnquist, C.J., dissenting) ("Congress has a compelling interest in ensuring the ability to enforce prohibitions of actual child pornography.").

160. *See* COPPA, H.R. 4623, § 2. Congress found the following:

> (1) Obscenity and child pornography are not entitled to protection under the First Amendment under *Miller v. California*, 413 U.S. 15 (1973) (obscenity), or *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography) and thus may be prohibited.;

(2) The Government has a compelling state interest in protecting children from those who sexually exploit them, including both child molesters and child pornographers. 'The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance,' *New York v. Ferber*, 458 U.S. 747, 757 (1982) (emphasis added), and this interest extends to stamping out the vice of child pornography at all levels in the distribution chain. *Osborne v. Ohio*, 495 U.S. 103, 110 (1990).;
(3) The Government thus has a compelling interest in ensuring that the criminal prohibitions against child pornography remain enforceable and effective. '[T]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.' *Ferber*, 458 U.S. at 760.;
(4) In 1982, when the Supreme Court decided *Ferber*, the technology did not exist to: (A) create depictions of virtual children that are indistinguishable from depictions of real children; (B) create depictions of virtual children using compositions of real children to create an unidentifiable child; or (C) disguise pictures of real children being abused by making the image look computer generated.;
(5) Evidence submitted to the Congress, including from the National Center for Missing and Exploited Children, demonstrates that technology already exists to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer generated. The technology will soon exist, if it does not already, to make depictions of virtual children look real.;
(6) The vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, and/or related media.;
(7) There is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children. Nevertheless, technological advances since *Ferber* have led many criminal defendants to suggest that the images of child pornography they possess are not those of real children, insisting that the government prove beyond a reasonable doubt that the images are not computer-generated. Such challenges will likely increase after the *Ashcroft v. Free Speech Coalition* decision.;
(8) Child pornography circulating on the Internet has, by definition, been digitally uploaded or scanned into computers and has been transferred over the Internet, often in different file formats, from trafficker to trafficker. An image seized from a collector of child pornography is rarely a first-generation product, and the retransmission of images can alter the image so as to make it difficult for even an expert conclusively to opine that a particular image depicts a real child. If the original image has been scanned from a paper version into a digital format, this task can be even harder since proper forensic delineation may depend on the quality of the image scanned and the tools used to scan it.;
(9) The impact on the government's ability to prosecute child pornography offenders is already evident. The Ninth Circuit has seen a significant adverse effect on prosecutions since the 1999 Ninth Circuit Court of Appeals decision in *Free Speech Coalition*. After that decision, prosecutions generally have been brought in the Ninth Circuit only in the most clear-cut cases in which the government can specifically identify the child in the depiction or otherwise identify the origin of the image. This is a fraction of meritorious child pornography cases. The National Center for Missing and Exploited Children testified that, in light of the Supreme Court's affirmation of the Ninth Circuit decision, prosecutors in various parts of the country have expressed concern about the continued viability of previously indicted cases as well as declined potentially meritorious prosecutions.;
(10) In the absence of congressional action, this problem will continue to grow increasingly worse. The mere prospect that the technology exists to create computer or computer-generated depictions that are indistinguishable from depictions of real

> Already, defendants contend that there is reasonable doubt as to whether a given computer image—and most prosecutions involve materials stored and exchanged on computers—was produced with an actual child or as a result of some other process. There are experts who are willing to testify to the same effect on defendants' behalf. Moreover, as computer technology continues its rapid evolution, this problem will only grow increasingly worse. Trials will increasingly devolve into jury-confusing battles of experts arguing over the method of generating an image that, to all appearances, looks like it is the real thing.[161]

In recognition of this dilemma, Collins contended that COPPA effectively narrowed its scope to only the compelling government interest of ensuring that purveyors of real child pornography could be successfully prosecuted.[162] According to Collins, the government could achieve this circumscribed goal by prohibiting virtual child pornography that is virtually indistinguishable from pornography produced using real children.[163]

To address this more limited government interest, COPPA restricted the definition of "child pornography" that the Supreme Court found constitutionally suspect in *Free Speech Coalition*.[164] In addition, COPPA attempted to remedy the affirmative defense attacked by the *Free Speech Coalition* majority.[165] According to proponents of the bill, the compression of the definitions of what constitutes child pornography, coupled

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> children will allow defendants who possess images of real children to escape prosecution, for it threatens to create a reasonable doubt in every case of computer images even when a real child was abused. This threatens to render child pornography laws that protect real children unenforceable.;
>
> (11) To avoid this grave threat to the Government's unquestioned compelling interest in effective enforcement of the child pornography laws that protect real children, a statute must be adopted that prohibits a narrowly-defined subcategory of images.;
>
> (12) The Supreme Court's 1982 *Ferber v. New York* decision holding that child pornography was not protected drove child pornography off the shelves of adult bookstores. Congressional action is necessary to ensure that open and notorious trafficking in such materials does not reappear.

Id.

161. *House Hearing*, *supra* note 146, at 4.

162. *See id.*

163. *Id.*

164. The CPPA provided definitions for what constitutes "child pornography." CPPA, 18 U.S.C. § 2256(8). *See Free Speech Coalition*, 535 U.S. at 256, where the majority found the challenged "appears to be" provision of the CPPA constitutionally overbroad. COPPA attempts to remedy the constitutional problems of the CPPA, in part, by narrowing the definition of what is child pornography from any image that "appears to be" of minor engaging in sexually explicit activity to "a computer image or computer-generated image that is, or is indistinguishable from that of a minor engaging in sexually explicit conduct." COPPA, H.R. 4623, § 3(a).

165. The *Free Speech Coalition* majority attacked the CPPA's affirmative defense as "incomplete and insufficient" primarily because the affirmative defense failed to provide a defense for possession. *Free Speech Coalition*, 535 U.S. at 256; *see also House Hearing*, *supra* note 146, at 5; COPPA, H.R. 4623, § 3 (COPPA specifically addressed the Court's concern by including a possession defense).

with the augmented affirmative defense, would address the government's interest in enforcing existing law while passing constitutional muster.[166]

Associate Deputy Attorney General Collins testified that COPPA refocused on enforcing *Ferber*'s prohibition of real child pornography in five ways.[167] The first of COPPA's amendments was a revision of the definition of child pornography to include only computer images or computer-generated images.[168] Proponents of the bill claimed that this narrowed focus addressed the major medium for transmitting child pornography.[169] According to COPPA's Congressional Findings and Collins's testimony, most child pornography is trafficked over the Internet and/or is found on computers.[170] Thus, by defining child pornography to include virtual images on the computer, Collins argued, COPPA would cover most of the material at the "core of the Government's practical concern."[171] Moreover, COPPA's circumscribed application to cover only computer images implicated a suppression "not . . . of any idea but rather to uses of particular instruments in a way that directly implicate[d] the Government's compelling interest in keeping the child pornography laws enforceable."[172]

Second, COPPA refined the definition of child pornography further by substituting the unconstitutional "appears to be" language of the CPPA with "virtually indistinguishable from that of a minor engaged in sexually explicit conduct."[173] Collins argued that by limiting the application only to images that "to an ordinary observer . . . could pass for the real thing," ensured that the government could successfully prosecute purveyors of real child pornography.[174]

COPPA further limited the scope of regulation for virtual child pornography by restricting prosecution of virtual child pornography to only those images depicting "lascivious" simulated intercourse.[175] Thus, according to Associate Deputy Attorney General Collins, COPPA would not place limitations on movies such as *Traffic*, since "'simulated' sexual intercourse would be covered only if . . . the depiction is 'lascivious' and involves the exhibition of the 'genitals, breast, or pubic area' of any per-

166. *See House Hearing*, *supra* note 146, at 10-11.
167. *Id.* at 4-5.
168. *Id.* at 4.
169. *Id.*
170. COPPA, H.R. 4623, § 2 ¶ 6; *House Hearing*, *supra* note 146, at 4.
171. *House Hearing*, *supra* note 146, at 4.
172. *Id.*
173. COPPA, H.R. 4623, § 3(a)(B); *see also Free Speech Coalition*, 535 U.S. at 265, 268 (dissenters argued that the CPPA should be narrowly construed to apply to only images that are "virtually indistinguishable" from a minor engaging in sexually explicit conduct).
174. *House Hearing*, *supra* note 146, at 5.
175. COPPA, H.R. 4623, § 3(b)(i).

son."[176] From the testimony, it seems evident that the intent of this provision was to respond to the *Free Speech Coalition*'s concern for movies and other artistic performances or representations that were prohibited under the CPPA.[177]

In conjunction with narrowing the focus of the government interests and the definitions of what constituted child pornography, COPPA also attempted to refine the affirmative defense in an effort to limit the reach of the bill.[178] As discussed above, both the majority opinion and Justice Thomas's concurring opinion expressly left open the possibility that an appropriate affirmative defense might aid the constitutionality of the CPPA.[179] Taking into account this opening, COPPA specifically addressed the stated insufficiencies of the CPPA's affirmative defense by including a defense for possession or production of child pornography requiring a showing that real children were not used in the production thereof.[180]

The *Free Speech Coalition* majority found the CPPA's affirmative defense insufficient to "save" the statute from being overbroad.[181] The majority criticized the CPPA's affirmative defense on two grounds.[182] First, the Court determined that the affirmative defense failed to provide a defense for possession.[183] "While the affirmative defense may protect a movie producer from prosecution for the act of distribution, that same producer, and all other persons in the subsequent distribution chain, could be liable for possessing prohibited work."[184] Second, the *Free Speech Coalition* majority found fault with the CPPA's failure to provide an affirmative defense to producers of images created not using real children.[185] COPPA specifically attempted to remedy these criticisms by including a defense that the images were not created using actual children.[186] Thus, under COPPA, a defendant charged with either possession

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176. *House Hearing*, *supra* note 146, at 8 (quoting COPPA, H.R. 4623, § 3(b)(i)).

177. *Id.* ("Notably, this change alone [the definition of sexually explicit conduct for simulated intercourse] eliminates most of the overbreadth identified by the Court; it was the breadth of the definition of sexually explicit conduct that led to distracting and unhelpful arguments over whether movies such as 'Traffic' and 'American Beauty' were covered.").

178. COPPA, H.R. 4623, § 3; *House Hearing*, *supra* note 146, at 5; *see also Free Speech Coalition*, 535 U.S. at 256 (finding the CPPA's affirmative defense to be "incomplete and insufficient").

179. *Free Speech Coalition*, 535 U.S. at 256, 259-60.

180. COPPA, H.R. 4623, § 3(c).

181. *Free Speech Coalition*, 535 U.S. at 256.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *See* COPPA, H.R. 4623, § 3(c) (amending the unconstitutional provision of the CPPA, 18 U.S.C. § 2252A(c), as follows: "[I]t shall be an affirmative defense to a charge of violating this section that the alleged offense did not involve the use of a minor."); *see also House Hearing*, *supra* note 146, at 5.

or distribution of child pornography could assert an affirmative defense if he could prove that no children were used in the production of the image.[187]

COPPA also attempted to refine the provisions concerning pandering of virtual child pornography by prohibiting any offer to purchase or sell real child pornography without requiring proof that such material actually exists.[188] The challenged provision of the CPPA criminalized sexually explicit depictions that were "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaged in sexually explicit conduct."[189] According to Associate Deputy Attorney General Collins, the Court criticized this provision because the "prior law criminalized materials based on how they were marketed."[190] In contrast, proponents of COPPA's new pandering provision suggested that the bill moved the focus from how sexually explicit material is marketed to the fact that sexually explicit material is marketed at all.[191] According to proponents of COPPA, this modification effectively responded to the Court's sharp criticism of criminalizing as pandering any offer to buy or sell child pornography.[192]

B. COPPA's Constitutional Problems

Proponents of COPPA contended that the bill effectively narrowed its focus and refineed the definitions and affirmative defense to accomplish the limited interest of enforcing the constitutional ban on child pornography produced using real children. If new legislation in the 108th Congress successfully works its way through the legislative process and becomes law, its constitutionality may again be challenged. While COPPA arguably narrowed the unconstitutional provisions of the CPPA, some clear problems still existed, and the constitutionality of new COPPA-like legislation is tenuous.[193] In fact, in a hearing before the Senate Judiciary Committee on the subject of child pornography, two witnesses, both law professors, claimed that COPPA, as drafted, was

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187. COPPA, H.R. 4623, § 3; *House Hearing*, *supra* note 146, at 5.

188. COPPA, H.R. 4623, § 4.

189. *Free Speech Coalition*, 535 U.S. at 257 (quoting CPPA, 18 U.S.C. § 2256(8)(D)).

190. *House Hearing*, *supra* note 146, at 5, 8 (statement of Associate Deputy Attorney General Daniel P. Collins, on behalf of the Dept. of Justice).

191. *Id.* at 8.

192. *Id.*

193. Kurt Indvik, *VSDA Says New Child Pornography Bill Will Likely Not Pass Judicial Muster*, VIDEO STORE, July 14, 2002, at 13, *available at* 2002 WL 24537763 (According to Sean Bersell, Vice President of public affairs for the Video Software Dealers Association, "We have looked at the house bill and we think that it would still fail the Supreme Court test under the *Free Speech Coalition* case.").

unconstitutional.[194] Indeed, even Representative Adam Schiff,[195] a member of the House Subcommittee on Crime, Terrorism, and Homeland Security, expressed his view that COPPA might fail constitutional muster.[196]

First, at least six justices have already rejected the government's argument for the "prosecution rationale," which is at the heart of COPPA's reworked provisions.[197] In *Free Speech Coalition*, the government expressly argued that the CPPA's provisions were necessary to prevent purveyors of real child pornography from claiming an automatic defense that the images were virtual and did not use real children.[198] The majority rejected this argument, stating: "The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down."[199] Moreover, even though Justice Thomas, in his concurring opinion, expressed his view that this prosecution rationale may one day prove sufficient to justify limits on virtual child pornography, he noted that "the Government asserts only that defendants *raise* such defenses, not that they have done so successfully . . . this speculative interest cannot support the broad reach of the CPPA."[200] Thus, unless the government can point to defendants who have been acquitted under a "virtual" defense, it is unclear whether the Court will be willing to acknowledge any proscription of virtual child pornography, under COPPA or similar legislation.[201]

Though COPPA may have narrowed its asserted purpose to enforcing child pornography laws, little changed in the interim between *Free Speech Coalition* and this proposed legislation.[202] In short, the govern-

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194. *Senate Hearing*, *supra* note 145 (statements of Frederick Schauer, Professor of the First Amendment at Kennedy School of Government, Harvard University, and Ann Couglin, Class of 1948 Research Professor of Law at the University of Virginia Law School. They both testified that COPPA was unconstitutional.).

195. Representative Schiff (CA-D) was elected to the United States House of Representatives in 2000 following a four-year term as a state senator in California. Prior to holding elected office, Mr. Schiff served in the United States Attorney's Office in Los Angeles, California. Representative Schiff is a graduate of Stanford University and Harvard Law School.

196. *House Hearing*, *supra* note 146, at 15-16 (Statement of Rep. Adam Schiff) ("I think that the problem of child pornography is such a serious one that the Supreme Court decision really has to be addressed legislatively . . . . I think that this bill does do that. It's still, I think, going to be a very close constitutional question, but I think it's one that we have to raise, if we're going to effectively combat this problem.").

197. *See Free Speech Coalition*, 535 U.S. at 254-55.

198. *Id.*

199. *Id.*

200. *Id.* at 259-60 (Thomas, J., concurring).

201. *See id.*

202. In fact, Congressional Findings supporting COPPA indicate that the technology to create computer images virtually indistinguishable from real child pornography does not exist. COPPA, H.R. 4623, § 2. For example, paragraph five states that "[t]he technology will soon exist, if it does not already, to make depictions of virtual children look real," and paragraph seven states that

ment has already tried to assert the prosecution rationale as a compelling government interest, and it has failed.[203]

However, even if the Court eventually accepts the prosecution problem as a justification for regulation of virtual child pornography, COPPA still proscribed a substantial amount of protected speech; the question is whether it was too much?[204] Even though COPPA, at least on its face, narrowed the scope of speech regulable as child pornography, instances remain where potentially nonobscene virtual images of children are still within the ambit of COPPA. Moreover, many of the purportedly narrowed provisions of COPPA amount to little more than just a restatement of the same definitions already found unconstitutional in *Free Speech Coalition*.[205]

For example, COPPA allegedly restricted its reach by applying to only computer images or computer-generated images.[206] In *Free Speech Coalition*, a majority of the Court specifically found that the First Amendment protects such images.[207] Associate Deputy Attorney General Collins argued that COPPA "extends not to the suppression of any idea but rather to uses of particular instruments, such as computers, in a way that directly implicates the Government's compelling interest in keeping the child pornography laws enforceable."[208] However, there is no practical difference between the two since, according to COPPA's Congressional Findings, most virtual child pornography is produced and transmitted using computer technology.[209]

Moreover, videos, photographs, and other images fall within COPPA's definition of child pornography so long as they are found on a computer.[210] Thus, even a protected image might be subject to COPPA if

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"[t]here is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children." *Id.* at ¶¶5, 7.

203. *See Free Speech Coalition*, 535 U.S. at 254-55.

204. *See* Indvik, *supra* note 193.

205. *Senate Hearing*, *supra* note 145 (statement of Ann Couglin) ("Indeed, it is difficult to understand how the House bill could be interpreted as an effort to correct the defects in the CPPA that were identified in Free Speech Coalition. Instead, the House bill seems to embody a decision merely to reenact the CPPA all over again.").

206. COPPA, H.R. 4623, § 3.

207. *See Senate Hearing*, *supra* note 145 (statement of Ann Coughlin). Professor Coughlin notes of the *Free Speech Coalition* decision, "In particular the Court concluded that the prohibitions covered materials: (1) that were not regulable under *Ferber* because they were not the product of child abuse . . . and (2) that were protected by *Miller* because they were of serious literary, artistic, scientific, or other value." *Id.*

208. *House Hearing*, *supra* note 146, at 4 (statement of Daniel P. Collins).

209. *See* COPPA, H.R. 4623, § 2.

210. *See House Hearing*, *supra* note 146, at 22-23 (Deputy Attorney General Collins, in response to Congressman Schiff's questions, acknowledged that the COPPA covers videos and photographs, or any image found on a computer.).

it was found on a computer or created using computer technology.[211] For example, with the increased accessibility, economic benefits, and abundance of the Internet, many movies already advertise trailers online. As technology advances, it is not beyond imagination that movies and other legitimate, and non-obscene, media may be available over the Internet. Given the scope of COPPA's definition of child pornography, many of the same concerns raised by the majority about the proscription of movies like *Traffic* and *American Beauty* might be proscribed under COPPA.[212]

In addition, by extending to all computer-generated images, COPPA might reach documentaries on child sexual abuse, which use computer graphics to avoid using real children, or even movies like *Titanic* or *A.I.*, which have already used computer technology to supplement and even replace real actors.[213]

Proponents of COPPA also argued that the scope of the bill was further limited by confining the definition of child pornography to any computer image that is *indistinguishable* from that of a minor engaging in sexually explicit conduct.[214] However, this very suggestion of restricting the CPPA to material indistinguishable from real child pornography was proffered by the dissenting justices in *Free Speech Coalition*[215] and was rejected by the Court.[216] Professor Schauer, in his testimony before the Senate Judiciary Committee, criticized the addition of the "indistinguishable" definition:

> Even if no person at all could tell the difference between materials using real children and materials using computer-generated images, the absence of real children in the latter case is exactly why the Supreme Court in *Free Speech Coalition* refused to find *Ferber* applicable, and no degree of indistinguishability in [t]he image can create a real child where none existed before.[217]

Thus, it is at least questionable whether COPPA meaningfully solved any of the constitutional flaws of the CPPA.[218] COPPA's acceptance of language that was expressly rejected by the majority, and failure to provide "any explanation for why this definition would be greeted by the Court as an improvement over the definition it just rejected,"[219] makes clear the

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211. *Id.*

212. *Free Speech Coalition*, 535 U.S. at 247-48.

213. *See* Anderson, *supra* note 13, at 393.

214. *House Hearing*, *supra* note 146, at 4 (statement of Daniel P. Collins).

215. *Free Speech Coalition*, 535 U.S. at 264-65 (O'Connor, J., concurring in part and dissenting in part), 268-73 (Rehnquist, J., dissenting).

216. *See id.* at 249-51 (dismissing the government's "virtually indistinguishable" construction argument).

217. *Senate Hearing*, *supra* note 145 (statement of Frederick Schauer).

218. *See id.*

219. *Id.* (statement of Ann Coughlin).

difficulty in regulating virtual child pornography after *Free Speech Coalition*. However, it is also clear that this new definition is highly susceptible to the same kind of overbreadth challenge that plagued its predecessor, the CPPA.[220]

In response to the potential overbreadth problems, COPPA also attempted to accommodate *Free Speech Coalition* by revising the affirmative defense found insufficient by the Supreme Court.[221] Associate Deputy Attorney General Collins suggested of the changes, "The affirmative defense is explicitly amended to include possession offenses . . . [and] is also amended so that a defendant could prevail simply by showing that no children were used in the production of the materials. Prior law only granted an affirmative defense for productions involving youthful-looking adults."[222] According to proponents of the bill, the narrowed definitions of child pornography, in tandem with the supplemented affirmative defense, ensured that COPPA's prohibition of virtual child pornography was not overbroad.[223]

According to the Vice President of Public Affairs for the Video Software Dealers Association, however, COPPA's affirmative defense amounted to little more than a burden-shifting device requiring the accused to prove his innocence by demonstrating that the images were not produced using real children.[224] Moreover, although the majority in *Free Speech Coalition* refused to specifically address the question of whether the affirmative defense could "save the statute,"[225] the Court suggested that there exists "serious constitutional difficulties [raised] by seeking to impose on the defendant the burden of proving his speech is not unlawful."[226] The Court also noted the difficulty of requiring a defendant to prove his innocence after prosecution has begun. Justice Kennedy wrote of the evidentiary dilemma, "Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors. If the evidentiary issue is a serious problem for the Government, . . . it will be at least as difficult for the innocent possessor."[227] Thus, even if COPPA's affirmative defense helped to suffi-

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220. *Id.* (statements of Frederick Schauer and Ann Coughlin).

221. COPPA, H.R. 4623, § 3. The COPPA also restricts its scope for sexually explicit images by requiring that simulated sexual intercourse be "lascivious" to violate the bill. *Id.* § 3(b)(B)(i). However, based on the hearing testimony, this restriction appears to be primarily intended to cover movies and other artistic performances, not virtual pornography. *See House Hearing*, *supra* note 146, at 8.

222. *House Hearing*, *supra* note 146, at 5 (statement of Daniel P. Collins).

223. *Id.*

224. Indvik, *supra* note 193; *see also Senate Hearing*, *supra* note 194 (statements of Frederick Schauer and Ann Coughlin).

225. *Free Speech Coalition*, 535 U.S. at 256.

226. *Id.* at 255.

227. *Id.* at 255-56.

ciently narrow its reach, it is unclear that an affirmative defense can be employed in the area of virtual child pornography to make an otherwise suspect statute constitutional.[228]

In addition, Professor Coughlin also asserted that COPPA's affirmative defense failed in substance.[229] Professor Coughlin argued that COPPA's affirmative defense was too broad and might create a loophole for some defendants to escape criminal liability even for obscene material.[230] She suggested, "[T]he House bill proposes to put in place an affirmative defense that could be read to authorize child pornographers who produce and peddle materials that possess no redeeming social value to escape prosecution on the ground that the materials were made without using an actual minor."[231] Consequently, even if the constitutionality of COPPA's affirmative defense was not at issue, the substance and one potential loophole might compromise the validity of the statute.[232]

Finally, COPPA's amended provision on pandering[233] purported to remedy the problems pointed out by the Court in *Free Speech Coalition* by focusing on the act of marketing instead of on the character of the material.[234] However, Congress's task in constitutionally regulating virtual child pornography may not be as simple as suggested by Associate Deputy Attorney General Collins.[235] Again, attempts to regulate virtual child pornography without regard to obscenity requirements could prove fruitless.[236] Professor Schauer contends:

> [COPPA] treats pandering as an independent offense without the necessity of a showing that the material pandered is in fact legally obscene or is in fact child pornography made with the use of a real child. In the absence of such a showing, the "advertising for an unlawful transaction" rationale disappears, and the pandering provision appears instead as a prohibition on the advertising of an immoral or unhealthy but lawful product, plainly protected by the First Amendment under recent court rulings.[237]

Once again, COPPA might be constitutionally suspect because of Congress's repeated attempts to try to regulate virtual child pornography with the same force of *Ferber*. After analysis, the best that can be said of

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228. *See Senate Hearing*, *supra* note 145 (statement of Frederick Schauer) (asserting the Court's skepticism to use affirmative defenses in the area of child pornography).

229. *Id.* (statement of Ann Coughlin).

230. *Id.*

231. *Id.*

232. *See id.*

233. COPPA, H.R. 4623, § 4.

234. *House Hearing*, *supra* note 146, at 5 (statement of Daniel P. Collins).

235. *See Senate Hearing*, *supra* note 145 (statement of Frederick Schauer).

236. *See id.*

237. *Id.*

COPPA is that it may still be unconstitutional.[238] Even proponents of legislation attempting to regulate virtual child pornography in the aftermath of *Free Speech Coalition* acknowledged the potential failings of COPPA.[239]

Even if COPPA or a similar bill were passed into law in the 108th Congress, the constitutionality of regulating virtual child pornography is unclear at best. Some commentators have argued that Congress is grandstanding or attempting to force defenders of the First Amendment to utilize limited resources in order to keep challenging the constitutionality of statutes implicating First Amendment restrictions.[240] Wendy Kaminer, for example, said of Congress's response to *Free Speech Coalition* and COPPA, "Maybe Congress and the White House doesn't [sic] care whether laws like these are constitutional . . . . Maybe they care mainly about getting credit for their passage (while draining resources of free-speech organizations by forcing them to challenge unconstitutional laws)."[241] This comment will not predict the future, but instead pose the questions that are likely to be litigated in the lower courts. And indeed, if passed, COPPA might suffer the fate of other statutes passed in response to Supreme Court decisions by floundering in the lower courts.[242] Though the future of any COPPA-like statute is unclear, if history is any indication, the constitutionality of such a bill will likely be challenged. This is clearly an undesirable result.[243] According to Professor Schauer, "As the six-year course of litigation under the previous Act so well demonstrates, constitutionally suspect legislation under existing Supreme Court interpretations of the First Amendment . . . puts the process of prosecuting the creators of child pornography on hold while the appellate courts proceed at their own slow pace."[244] While there may be room in the Constitution for symbolic legislation, "for Congress to enact symbolic but likely unconstitutional legislation would have the principal ef-

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238. *Id.* (statements of Frederick Schauer and Ann Coughlin asserting that COPPA was likely unconstitutional and the provisions amounted to little more than a second attempt at the same provisions of the CPPA that the Court found unconstitutional in *Free Speech Coaltion*).

239. *House Hearing*, *supra* note 146, at 15-16 (statement of Rep. Adam Schiff).

240. Wendy Kaminer, *Porn Again*, AM. PROSPECT, July 1, 2002, at 9, *available at* 2002 WL 7761513; *see* Mark Alexander, *The First Amendment and Problems of Political Viability: The Case of Internet Pornography*, 25 HARV. J. L. & PUB. POL'Y 977, 999, 1030 (2002) (arguing that, in the realm of Internet pornography, Congress enacts unconstitutional laws in order to meet public concerns after laws are found by the Supreme Court to be unconstitutional).

241. Kaminer, *supra* note 240.

242. *See id.* (discussing the enactment of the Child Online Protection Act of 1997 passed in response to the Supreme Court finding the Communications Decency Act unconstitutional. After a federal appeals court struck down the Child Online Protection Act, the Supreme Court denied certiorari and sent the case back to the lower courts while continuing to enjoin enforcement of the Act).

243. *See Senate Hearing*, *supra* note 145 (statement of Frederick Schauer).

244. *Id.*

fect of postponing for conceivably six more years the ability to prosecute those creators of child pornography whose prosecution is consistent with the Supreme Court's view of the First Amendment."[245]

C. *The Easy Answer:* Miller

Though the constitutionality of a COPPA-like statute is debatable, the controversy will likely end in the Supreme Court. Given the clear reluctance of the Court to uphold the constitutionality of the CPPA's ban on virtual child pornography, the best and most effective option may be to enforce existing law and prosecute virtual child pornography as obscenity.[246] While the *Miller* obscenity standard is certainly more malleable and less severe than *Ferber*'s outright ban on child pornography, much of the worst or hardest types of even virtual pornography will likely meet the standards of obscenity. Though obscenity may not be the most effective method for stamping out child pornography, it is one of the few sure formulas for regulation left standing after *Free Speech Coalition.*

As discussed above, the government may regulate obscenity under a *Miller* statute if the material, taken as a whole: 1) appeals to the prurient interest; 2) is patently offensive; 3) in light of community standards; and 4) lacks scientific, literary, artistic, or political value.[247] In the realm of child pornography, virtual or otherwise, any material, whether on a computer or elsewhere, that appeals to the prurient interest in a way that offends community standards and lacks social value can be regulated under existing and well-recognized obscenity laws.[248] Thus, under a *Miller* statute, Congress may constitutionally prohibit the distribution of virtual child pornography as obscenity.

While burdens of prosecuting pornographers are certainly eased under *Ferber* and its progeny,[249] a *Miller* obscenity statute will still reach a great deal of virtual child pornography because most child pornography fits within the definition of obscenity.[250] Moreover, a Renaissance painting or movie like *Traffic*, both of which the *Free Speech Coalition* Court worried might be banned under the CPPA,[251] would not foster criminal liability. Given the Court's reluctance to accept the government's arguments in defense of the CPPA, addressing the problems of virtual child

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245. *Id.*

246. Treglia, *supra* note 8 (arguing that state obscenity laws are still in force after *Free Speech Coalition*).

247. *Free Speech Coalition*, 535 U.S. at 246 (citing Miller v. California, 413 U.S. 15, 24 (1973)).

248. *See* Treglia, *supra* note 8.

249. *See Senate Hearing*, *supra* note 145 (statement of Frederick Schauer).

250. *See id.*

251. *See Free Speech Coalition*, 535 U.S. at 241.

pornography as obscenity and aggressively prosecuting offenders may be the government's most viable means of regulating virtual child pornography.

In addition to COPPA's constitutionally questionable amendments for regulating child pornography, section five of the bill also proposed additional and more stringent penalties for obscene materials depicting pre-pubescent children.[252] Even the *Free Speech Coalition* Court acknowledged that the age of the persons engaged in sexually explicit conduct might be relevant in determining whether material is obscene.[253] Thus, more stringent penalties may be one way to combat virtual pornography within the constitutional rubric of *Miller*.

The applicability and constitutional attractiveness of using a *Miller* statute to regulate virtual child pornography is evident.[254] The *Miller* test requires satisfaction of four prongs.[255] Under *Miller*'s first prong, material may be obscene if it appeals to the prurient interest.[256] This prong is to be adjudged by the trier of fact based upon whether the average person would find the work to appeal to the prurient interest.[257] If adult pornography can meet this first prong, certainly child pornography, whether virtual or not, will likely be found by the average member of any community to appeal to the prurient interest in sex.

Miller's second prong requires that, for a work to be regulated as obscenity, the material must depict sexual conduct in a patently offensive way specifically defined by law.[258] The *Miller* Court suggested that "patently offensive" might be defined as "representations . . . of ultimate sexual acts, normal or perverted" or "representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[259] In the context of virtual child pornography, COPPA's definitions of "sexually explicit conduct" likely comply with the patent offense requirement. Moreover, similar descriptions were included in the proposed Senate bill, PROTECT. In addition, Professor Schauer testified that "there has never been any indication that the activities specified are not within the range that a legislature may constitutionally find to be patently

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252. COPPA, H.R. 4623, § 5. The constitutionality of these provisions is beyond the scope of this Comment. The significance lies in Congress's ability to set more stringent penalties for obscenity involving children.

253. *Free Speech Coalition*, 535 U.S. at 240.

254. Treglia, *supra* note 8; *see Senate Hearing*, *supra* note 145 (statement of Frederick Schauer) (arguing that the Senate bill, PROTECT, is constitutional because it requires that material be obscene in its definition of covered child pornography).

255. *Miller*, 413 U.S. at 24.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 25.

offensive."[260] In conjunction with this second prong, *Miller* also requires that regulable obscenity be patently offensive in light of community standards.[261] As is discussed further below, regulation of virtual child pornography under *Miller* is unlikely to be hampered significantly due to a "community standards" requirement.

Finally, *Miller* protects certain materials by defining as obscene only those which, taken as a whole, lack serious literary, artistic, scientific, or political value.[262] This requirement leaves open an exemption for a Renaissance painting, movies, and pictures in scientific texts.[263] Congress could easily rewrite a constitutional virtual child pornography statute by providing exemptions for materials with serious social value.[264] Since virtual child pornography does not exploit actual children in the production process, protecting works with social value does not risk further harm to children, the basis for *Ferber*'s ban on real child pornography.[265] Moreover, even the *Ferber* Court acknowledged that there might be instances where depictions of children engaged in sexually explicit conduct have some social value.[266] However, to protect both children and the First Amendment simultaneously, the *Ferber* Court suggested specifically that youthful looking adults be used in place of children if real scientific or artistic value would be lost without the inclusion of the sexually explicit conduct.[267] In short, Congress could constitutionally regulate virtual child pornography so long as the statute reached only images without serious scientific, artistic, literary, or political value.

Though virtual child pornography is regulable under a *Miller* obscenity statute, some commentators have argued against applying the *Miller* test to the context of child pornography.[268] For example, in *Ferber*, the community standards requirement was found inappropriate when balanced against judging the primary harm to a real child in the produc-

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260. *Senate Hearing*, *supra* note 145 (statement of Frederick Schauer). Although Professor Schauer's testimony focused on the proposed Senate bill, PROTECT, with the exception of the proposed Senate bill's inclusion of an obscenity requirement, the descriptions of sexually explicit material are the same for both PROTECT and COPPA.

261. *Miller*, 413 U.S. at 24.

262. *Id.* at 24-25.

263. *See Free Speech Coalition*, 535 U.S. at 240-41.

264. Meeting the criteria for *Miller*'s third prong could be accomplished simply by adding a provision to the statute that required the prosecutor to prove that the work in question lacked serious literary, artistic, scientific or political value. *See id.* at 246-47 (asserting that the CPPA lacked any accommodation for works with social value as defined by *Miller*).

265. *See* New York v. Ferber, 458 U.S. 747, 761 (1982).

266. *See Ferber*, 458 U.S. at 762-63.

267. *See id.* at 763.

268. *See* Anderson, *supra* note 13; Matthew K. Wegner, Note, *Teaching Old Dogs New Tricks: Why Traditional Free Speech Doctrine Supports Anti-Child-Pornography Regulations in Virtual Reality*, 85 MINN. L. REV. 2081, 2110 (2001) (citing Dennis W. Chiu, *Obscenity on the Internet: Local Community Standards for Obscenity Are Unworkable on the Information Superhighway*, 36 SANTA CLARA L. REV. 185, 188-89 (1995)).

tion of child pornography.[269] Avoiding the possibility that real child pornography might be judged obscene in one community while not in another was one of the justifications the *Ferber* Court gave for moving beyond the traditional obscenity test.[270] In short, the *Ferber* Court recognized the primary harm to a child in the context of real child pornography and concluded that the government could constitutionally protect children from this harm in every state without examining local standards of decency.

However, in *Free Speech Coalition*, a majority of the Court found no direct link between virtual child pornography and pedophilia.[271] Thus, after *Free Speech Coalition*, it will be hard to argue secondary harm to children in virtual child pornography cases since the Court has already addressed and rejected this argument.[272] Given the limitations on regulating virtual child pornography after *Free Speech Coalition*, as well as the decreased fear that differing community standards might lead to variances in the primary harm to children, *Miller* continues to be the light at the end of the tunnel for regulating at least some virtual child pornography. While some virtual pornography may fall through the cracks of the obscenity test, most communities from Bangor, Maine, to Los Angeles, California, will find virtual depictions of children engaging in sexually explicit conduct to be offensive.

Though the government may regulate the distribution of a substantial amount of virtual child pornography as obscenity,[273] under *Stanley v. Georgia*[274] possession of obscenity in the home cannot be constitutionally prohibited.[275] This is likely one reason Congress drafted COPPA (and the CPPA) without regard to the *Miller* requirements. For proponents of the strict regulation of virtual child pornography, the inability to regulate possession of explicit but virtual images of children presents a clear problem to which there is no easy answer. Even with advances in technology, it is easier for the government to monitor materials posted on a Web site than to track and locate the individuals who choose to access the Web site to view or download pornography. In addition, those distributing virtual child pornography from shops and storefronts are more easily located than those who possess movies or magazines in their homes. Certainly, this logistical practicality argument is of little comfort to those who aim to stamp out the market for child pornography. How-

269. *Ferber*, 458 U.S. at 761.
270. *Id.*
271. *Free Speech Coalition*, 535 U.S. at 250.
272. *Id.*
273. *See Miller*, 413 U.S. at 15.
274. *See* Stanley v. Georgia, 394 U.S. 557 (1969).
275. *Stanley*, 394 U.S. at 566.

ever, finding and punishing the purveyors of child pornography may be the most effective way to target the industry.

Additionally, some have argued that *Miller*'s community standards prong is problematic when applied to regulating the distribution of virtual child pornography over the Internet.[276] Matthew K. Wegner, in arguing for the creation of a new category for virtual child pornography and a national obscenity standard, suggests that the *Miller* standard's focus on local community standards is outmoded as community standards have become increasingly global.[277] Wegner further argues that regulation of obscenity over the Internet presents a notice problem as materials pass jurisdictional boundaries over the Internet into communities that may have more or less strict standards than the location from which the material originated.[278] However, if the argument supporting the globalization of community standards is true, then it is unlikely that obscenity will be judged differently in distinct jurisdictions. That is, if global standards exist, material found obscene in one jurisdiction will likely be obscene in another. In short, with the globalization of community standards the problem of notice becomes increasingly obsolete.[279]

The *Miller* approach, though not perfect in the context of virtual child pornography, provides a proven method of regulating the type of material at the heart of the CPPA and COPPA. The *Ferber* prohibition on child pornography provides stronger medicine for battling the child pornography industry.[280] However, even under *Ferber*, written material about child pornography cannot be constitutionally regulated.[281] Thus, even the *Ferber* Court recognized the need to limit the application of its decision to pornography involving and harming a real child.[282] The *Free Speech Coalition* majority was unwilling to equate the primary harm to children inherent in the *Ferber* rationale with the secondary effects of virtual child pornography argued by the government.[283] Without more convincing evidence of the primary harm to children, for now, at least, it seems that virtual child pornography has more similarities to written ma-

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276. Wegner, *supra* note 268, at 2110 (citing Chiu, *supra* note 268, at 188-89).

277. *Id.* at 2110 (citing Chiu, *supra* note 268, at 215).

278. *Id.* (citing Chiu, *supra* note 268, at 188). Wegner further argues that the Supreme Court should adopt a national obscenity standard. However, this argument has not been accepted by the Supreme Court.

279. In other computer crimes, many states have adopted broader jurisdiction requirements that encompass the global nature of the Internet. *See* Eric J. Bakewell et al., *Computer Crimes*, 38 AM. CRIM. L. REV. 481, 519 (2001) (citing Terrence Berg, *State Criminal Jurisdiction in Cyberspace: Is There a Sheriff on the Electronic Frontier?*, 79 MICH. B.J. 659, 661 (2000)).

280. *See Senate Hearing*, *supra* note 145 (statement of Frederick Schauer) (arguing that the procedural and substantive obstacles to enforcing obscenity may make PROTECT, a bill otherwise constitutional because of the inclusion of *Miller* requirements, ineffective).

281. *Ferber*, 458 U.S. at 764-65.

282. *See id.* at 764.

283. *Free Speech Coalition*, 535 U.S. at 250-51.

terial than sexually explicit images produced with real children. Given the current backdrop, the war against child pornography—and specifically, virtual images—must be waged with *Miller*. In short, though *Miller* may not be the best method of abolishing the market for child pornography, it seems to be the most certain.

CONCLUSION

In the aftermath of *Free Speech Coalition*, Congress needs to rethink its approach to regulating virtual child pornography. Unless Congress can persuade the Court that the existence of virtual child pornography directly harms children, and legislation is necessary to enforce the existing laws, restrictions like those in the CPPA and COPPA will likely continue to be deemed unconstitutional. Whether the Court will ever accept that the mere existence of child pornography, virtual or real, creates direct harm to children is an open question. However, if the dire predictions are correct and more children are molested because of the *Free Speech Coalition* decision, then, absent more convincing empirical evidence of primary harm, both the federal and state legislatures must find a constitutional way to protect the nation's children from abuse. Though the future is uncertain, there are strong arguments to be made that COPPA is little more than just a loosely reworded version of the very statute the Supreme Court struck down in *Free Speech Coalition*. And while courts are attempting to determine whether the rewording narrows the bill's application enough to pass constitutional muster, time and resources are directed toward arguing semantics and away from prosecuting purveyors of child pornography and obscenity.

In the end, critics of the Court's decision in *Free Speech Coalition* may not be satisfied with a *Miller* response. Nonetheless, to be certain that at least some, if not most, of the worst purveyors of pornography are prosecuted, Congress should revise COPPA to comply with *Miller*, ensuring that the law prohibits at least "hard core" virtual child pornography. If existing obscenity laws are enforced effectively, the law will, as it should, protect both the sanctity of our ideas and the innocence of our children.

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